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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 143

BENJAMIN J. WEIL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 144

L. VICTOR WEIL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 35–45) is unreported. The opinion of the Court of Appeals (R. 133–141) is reported in 173 F. 2d 805.

JURISDICTION

The judgments of the Court of Appeals were entered on April 6, 1949 (R. 141–142). The peti-

tion for writs of certiorari was filed on June 27, 1949. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Whether the court below was correct in ruling that, on the record facts in this case, the Tax Court properly concluded that amounts on account of executor's commissions and interest constituted taxable income to taxpayers in 1939 and 1941, when actually received by them, and that these amounts may not be regarded as having been constructively received in the respective prior years, 1932 and 1940, when they were awarded by the Surrogate's Court and when they were included in taxpayers' income tax returns.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 42 [As amended by Sec. 114, Revenue Act of 1941, c. 412, 55 Stat. 687]. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.
>
> (a) *General Rule.*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.
>
> * * * * *
>
> (26 U. S. C. 1946 ed., Sec. 42.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

> SEC. 19.42–1 [As amended by T. D. 5086, 1941–2 Cum. Bull. 38, and T. D. 5233, 1943 Cum. Bull. 198]. *When included in gross income.*—
>
> (a) *In General.*—Except as otherwise provided in section 42, gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. * * *
>
> SEC. 19.42–2. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. If a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date,

the mere crediting on the books of the corporation does not constitute receipt.

STATEMENT

The Tax Court made the following findings:

Jonas Weil, father of taxpayers, died in 1917. At the time of his death he was engaged in the real estate business in his own name and was a member of the real estate firm of Weil & Mayer, a partnership, in which he owned a one-half interest. From 1925 to April, 1945, the date of the hearing in the instant proceedings, taxpayers were the joint executors of his estate. Its chief assets were real estate, mortgages, and an interest in the real estate and mortgages owned by Weil & Mayer. The heirs of Jonas Weil consisted of two sons, the taxpayers, and two daughters. Under his will each heir was given an undivided one-fourth interest in his residuary estate. At some time prior to the taxable years, one of the daughters was paid her share in full, and the other daughter died, leaving seven children. Thereafter, taxpayers each owned one-third interest in the residuary estate and the heirs of the deceased daughter owned the remaining one-third interest (R. 36).

After their father's death, taxpayers filed claims against his estate on the ground that by contract he had granted them a share of his earnings from Weil & Mayer in consideration of their services rendered to him. On May 26, 1927, in satisfaction of their claims, the Surrogate's Court,

New York County, allowed taxpayer Benjamin Weil $360,086.94 and taxpayer L. Victor Weil $231,829.96 (R. 36–37).

Taxpayers, as executors, filed an account from 1917 to 1928, and applied to the state court for allowance of executor's commissions and also for interest on the sums which had already been decreed to them by reason of their claims against the estate. The Surrogate's Court, on February 11, 1932, made the following awards (R. 37):

	Benjamin J. Weil	L. Victor Weil	Total
Executor's commissions	$61,715.06	$61,715.06	$123,430.12
Interest	48,224.61	9,370.34	57,594.95
Total	109,939.67	71,085.40	181,025.07

Taxpayers reported these amounts ($109,939.67 and $71,085.40) on their respective 1932 returns but by reason of large sums claimed as losses on worthless stock they showed no tax as due (R. 37).

On the other hand, the 1932 income tax return of Jonas Weil Estate did not show the payment of this interest and commissions or claim any deductions on that account. The estate return for 1932 reflected a loss of $91,265.47. Had the payment of interest and commissions been included, the estate loss for 1932 would have exceeded $272,000 (R. 37).

On January 1, 1930, the estate had assets of all categories, excluding partnership interest in Weil & Mayer, totaling $331,124.59. In January 1932, the estate was in approximately the same condi-

tion (R. 37–38). During 1932, the monthly bank balances as shown on the first day of each month ranged from a high of $231,000 in March to a low of $153,000 in December. The Tax Court explicitly found that the record does not disclose the extent of the liabilities either by stipulation or evidence and is not clear as to the amount or manner of payment of the current operating expenses of the estate. Therefore the Tax Court expressly did (R. 38)—

> not find that during 1932 there were sufficient cash assets available in the Jonas Weil Estate to pay the claims of the petitioners for their executor's compensation and interest, while at the same time paying the operating expenses and keeping a sufficient reserve to meet outstanding liabilities.

From 1932 to 1941, the annual operating expenses were substantially the same each year. In 1933, they were $65,000 and in 1934, $69,000 (R. 38).

From 1932 to 1939, taxpayers, as executors, paid themselves on their awards for compensation and interest the following amounts (R. 38):

	Benjamin J. Weil	L. Victor Weil
During 1932	$30,064.08	$29,131.68
During 1933	20,000.00	22,500.00
During 1934	13,000.00	5,000.00
During 1935	345.63	None
During 1936	822.36	None
During 1937	2,834.06	2,500.00
During 1938	11,010.87	None
During 1939	31,862.67	11,953.72
Total	109,939.67	71,085.40

These amounts were treated as deductions for the years when paid in the estate income tax return. The total amount paid each executor did not include any interest for such payment from 1932 to the year in which payment was made (R. 38).

On March 23, 1940, the Surrogate's Court awarded taxpayers as fees and commissions for the years 1930 to 1938, inclusive, $29,141.38 each, or a total of $58,282.76. Each taxpayer returned the entire award in his 1940 return but the tax on the award was paid in that year as though the amounts were actually received during the years 1930 to 1938, inclusive, under the provisions of Section 107 (a) of the Internal Revenue Code (R. 39).

In 1940, the net worth of the Jonas Weil Estate was approximately $209,000 plus its interest in the Weil & Mayer partnership. The monthly bank balance on the first of each month of the estate ran from $6,000 in January to $34,000 in November. The monthly bank balance of the firm of Weil & Mayer, in which, as aforesaid, the estate owned a one-half interest, ranged from $580 in December to $16,000 in September, 1940. The combined total bank balance on the first day of each month of 1940 of the estate plus the one-half interest in the bank balance of Weil & Mayer ranged from a high of $49,000 in November to a low of $19,000 in January. The current operating expense for the estate in 1940 was $41,209.94.

The net worth of Weil & Mayer was in excess of $2,000,000. In the absence of evidence as to the outstanding indebtedness or the manner of paying the operating expenses, the Tax Court explicitly did (R. 39)—

> not find that during the year 1940 the Jonas Weil Estate could have paid these petitioners their award of $58,282.76 from available cash.

The actual payments on these awards up to July 29, 1942, were as follows (R. 39):

	Benjamin J. Weil	L. Victor Weil
1940	$5,000	$5,000
1941	10,000	10,000
1942 (to July 29)	2,500	2,500

The Jonas Weil Estate claimed these payments as deductions on its income tax return as they were made (R. 40).

Both taxpayers and the estate were on the cash receipts and disbursements basis. The estate did not set up the awards of the Surrogate's Court in favor of taxpayers as accounts payable and the amounts of these awards were not credited to taxpayers on the estate's books in the years they were made, and no funds were segregated or set aside for them (R. 40.)

The Tax Court further found that during both 1931 and 1940 there is no question but that the total assets of the Jonas Weil Estate were amply sufficient to pay taxpayers' claims but that tax-

payers did not sustain the burden imposed upon them to show that during those two years there was cash available or assets convertible into cash to accomplish payment of these claims (R. 44).

The Commissioner determined that the following amounts received by taxpayers from the estate in 1939 and 1941 constituted taxable income to them in those years (R. 40):

	Benjamin J. Weil	L. Victor Weil
1939	[1] $31,826.67	$11,953.72
1941	10,000.00	10,000.00

[1] The Tax Court notes that it appears from the evidence that this amount should have been $31,862.67 (R. 40).

The Tax Court sustained the Commissioner's determinations (R. 40–45, 46–47); upon taxpayers' appeal, the court below affirmed the Tax Court (R. 133–139). Judge Learned Hand dissented (R. 139–141).

ARGUMENT

1. There is no conflict in principle, as taxpayers concede (Pet. 11), between the decision below and that of the Court of Appeals for the First Circuit in *Ross* v. *Commissioner,* 169 F. 2d 483 (R. 135); nor is there, contrary to taxpayers' contention (Pet. 12–14), any conflict in application of principle. Again, contrary to taxpayers' contention (Pet. 12–13), the recent holding of the court below in *Aramo-Stiftung* v. *Commissioner,* 172 F. 2d 896 (C. A. 2d), is consistent with its decision here; the cases are readily distinguishable on their facts.

In short, this case turns on its own facts and raises no question of warranting the intervention of this Court.

In the last analysis, taxpayers' contention here is that the mere award by a state court in an accounting decree of commissions and interest in favor of the accounting executors against an estate constitutes, in and of itself, and without more, the receipt of income on the cash basis by the executors individually in whose favor the award is made. Although the controlling Treasury Regulations 103, Section 19.42–2, *supra,* have been in effect substantially since 1918 (R. 134), and state courts have awarded commissions to a multitude of executors in the thirty years that have intervened, nevertheless, no precedent supports taxpayers' contention. Such decrees represent no more than judicial determinations of liability, and cannot be conclusively regarded as equivalent to actual cash payment. Assuming, arguendo, as did the court below, that in the case of an estate whose books show only receipts and disbursements, such accounting decrees may be considered as a "credit" of income within the meaning of the governing Regulations, *supra,* p. 3, nevertheless, they surely do not constitute, as the court below correctly held (R. 136–137), compliance with the further provisions of the Regulations, *supra,* p. 3, that:

> To constitute receipt in such a case the income must be credited or set apart to the

> taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition.

Thus, here, one-third of the estate was owned by seven children of a deceased sister and taxpayers had been engaged in litigation adverse to that branch of the family (R. 36–37). In exercising their discretion as to the time of payments to themselves, taxpayers as fiduciaries were required to consider the interests of the estate; in their individual capacities they did not unrestrictedly control the money until they had objectively indicated the exercise of discretion in favor of immediate payment to their personal accounts. Not only did they do nothing to indicate that the money was immediately available to them in their personal capacity (R. 137), but in contradiction of their present assertion that the entire amounts were constructively received in the years of the decrees, they caused the estate to claim deductions for payments to them in its income tax returns for the years 1932 to 1942 only as and when cash payments actually were made (R. 37–38, 40, 137).

2. The court below did not err in refusing to reverse, as clearly erroneous, the fact findings of the Tax Court that sufficient cash was not shown

to have been available to make the payments in the years of claimed constructive receipt (R. 38–39, 44–45, 138–139).[1] The opinions of the court below and of the Tax Court, with sufficient detail for present purposes, set forth the substantial basis in the record for the assailed findings of fact. Whether income has been constructively received is a question the answer to which depends upon an appraisal of all the circumstances. Contrary to taxpayer's contention (Pet. 14–17), there is no rule of law that a constructive receipt follows because, despite a lack of cash on hand, funds might have been obtained through borrowing or selling assets. Indeed, there are decisions to the effect that a possibility of borrowing or selling assets is not enough when funds are not actually so secured. *Adler* v. *Commissioner,* 77 F. 2d 733, 734 (C. A. 5th); *Lawrence* v. *Commissioner,* 143 F. 2d 456 (C. A. 9th); *Northern Trust Co.* v. *Commissioner,* 8 B. T. A. 685, 687; *Chandler* v. *Commissioner,* 16 B. T. A. 1248. And, on this record, it was entirely uncertain whether attempts at so obtaining cash would have been successful (R. 44). What is most significant in this case, however, as the court below noted (R. 137, 139), is that the executors would have been required to exercise their discretion before borrowing or selling, a step which they never took.

[1] The dissenting opinion explicitly refrained from passing upon this question (R. 141).

CONCLUSION

The decision of the court below is correct and no question warranting review is presented. The petition for writs of certiorari should be denied.

Respectfully submitted.

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